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Supreme Court, U.S.
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No. 94-1907

In the Supreme Court of the United States

OCTOBER TERM, 1995

MORRIS WINSTON WILSON, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The court of appeals determined that petitioner, an alien who pleaded guilty to a narcotics offense and against whom a judgment of guilt was entered, was "convicted" for purposes of deportation under 8 U.S.C. 1251(a)(2)(B)(i) (1988 & Supp. IV 1992), authorizing deportation of persons convicted of narcotics offenses. In determining that petitioner had been convicted, the court was guided by the holding of the Board of Immigration Appeals in *In re Ozkok*, 19 I. & N. Dec. 546, 551 (1988), that a conviction exists for immigration purposes "if the court has adjudicated [the alien] guilty or has entered a formal adjudication of guilt." The question presented is:

Whether the decision in *Ozkok* is invalid and the court of appeals' decision is consequently erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 43 F.3d 211. The opinion of the Board of Immigration Appeals (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1995. The petition for a writ of certiorari was filed on May 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen and native of St. Christopher. In March 1985 he entered the United States as a non-immigrant visitor. In May 1988, following his marriage to a United States citizen, his status was adjusted to that of lawful permanent resident. Pet. App. A2.

On July 15, 1988, petitioner pleaded guilty in Texas state court to unlawful possession of more than four ounces but less than five pounds of marijuana, in violation of Art. 4.05 of the Texas Penal Code (West 1994). The Judicial District Court of Dallas County entered a judgment stating that "[i]t is therefore found and adjudged by the court, that the said Defendant is guilty of the felony offense." Pet. App. A2. Petitioner was sentenced to four years' imprisonment and a $500 fine, but the court suspended the sentence of imprisonment in favor of a four-year period of probation. *Ibid.*

Petitioner served his sentence of probation. On July 17, 1992, the court entered an order discharging petitioner from probation. That order set aside the conviction, dismissed the indictment, and released petitioner from "all penalties and disabilities resulting from the Judgment of Conviction in this cause." A.R. 57;[1] Pet. App. A2-A3.

2. On May 31, 1992, several weeks before the end of petitioner's probation, the Immigration and Naturalization Service (INS) issued an order to show cause why petitioner should not be deported under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(B)(i) (1988

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[1] The Administrative Record is cited herein as "A.R. __."

& Supp. IV 1992). Pet. App. A3. That Section provides that "[a]ny alien who at any time after entry has been convicted of a violation of * * * any law or regulation of a State, the United States, or a foreign country relating to a controlled substance * * * is deportable."[2] Petitioner admitted the allegations against him, but contended that his conviction did not qualify as a conviction for immigration purposes because, upon completion of his sentence, the court set aside the indictment and all penalties and disabilities resulting from the conviction. Pet. App. A3; A.R. 49, 71-74. In an oral decision on July 1, 1993, the immigration judge rejected petitioner's argument and found that the formal judgment of guilt entered against petitioner amounted to a "conviction" under Section 241, rendering him deportable. Pet. App. A3; A.R. 37-41. The Board of Immigration Appeals (BIA) agreed, and dismissed the appeal. Pet. App. B1-B8.

3. In a per curiam opinion, the Fifth Circuit affirmed. Pet. App. A1-A15. The court held that petitioner's conviction met the standard set forth in the BIA's decision in *In re Ozkok*, 19 I. & N. Dec. 546, 551 (BIA 1988), under which the BIA "shall consider a person convicted if the court has adjudicated him guilty or has entered a formal judgment of guilt." Pet. App. A12. The court acknowledged that "the *Ozkok* standard represents a departure from the BIA's previous position, which required 'the action of the court [to be] considered a conviction by the state

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[2] The Section expressly exempts a conviction for "a single offense involving possession for one's own use of 30 grams or less of marijuana," 8 U.S.C. 1251(a)(2)(B)(i) (1988 & Supp. IV 1992), but petitioner's conviction did not fall under that exception. Pet. App. A3 n.1.

for at least some purpose.'" *Id.* at A6 (citing *Ozkok*, 19 I. & N. Dec. at 549 n.4; *Martinez-Montoya* v. *INS*, 904 F.2d 1018, 1021 (5th Cir. 1990)). The court held that the BIA's revised interpretation of "conviction" was a reasonable one, however, consistent with congressional intent and with this Court's precedents. Pet. App. A9-A12.

The court rejected petitioner's contention that the Firearms Owners' Protection Act (FOPA), 18 U.S.C. 921, manifested congressional intent to employ the BIA's pre-*Ozkok* interpretation of "conviction" under the INA. Pet. App. A7-A9. Petitioner asserted that the FOPA undermined the premise of *Ozkok* that the meaning of "conviction" under the INA is a question of federal law. He pointed to the fact that *Ozkok* had referred to this Court's holding in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), that the definition of "conviction" under the federal firearms statute was a question of federal law. Because Congress in the FOPA overruled *Dickerson* and expressly provided that the meaning of "conviction" is "to be determined in accordance with the law of the jurisdiction in which the proceedings were held," 18 U.S.C. 921, petitioner urged that *Ozkok*, too, was invalid. The court of appeals, however, concurred with the Fourth Circuit's observation in *Yanez-Popp* v. *INS*, 998 F.2d 231, 236 (1993), that *Dickerson* "still stands for the general proposition that federal law governs the application of Congressional statutes in the absence of a plain language to the contrary." Pet. App. A8. The court below concluded that "the firearms amendment mandates a state definition of conviction *only for the firearms statute that it*

amends. For the purposes of the INA, the amendment is inapplicable." Pet. App. A8-A9.

The court of appeals also rejected petitioner's contention that the *Ozkok* standard conflicts with *Pino* v. *Landon*, 349 U.S. 901 (1955) (per curiam). *Pino* addressed the effect under the INA of an alien's petty larceny offense where the state court found him guilty but placed the case "on file," thereby deferring the imposition of any judgment or sentence and also postponing any consequent appeal. See Pet. App. A9. This Court's one-paragraph decision in *Pino* stated:

> On the record here we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of § 241 of the Immigration and Nationality Act. The judgment is reversed.

349 U.S. 901, 901. Of importance to petitioner was the fact that, in the course of its opinion, the First Circuit in *Pino* had noted that "the meaning of the word 'convicted' is a federal question," Pet. App. A10 (quoting *Pino* v. *Nicolls*, 215 F.2d 237, 243 (1954)); petitioner gleaned from the Supreme Court's reversal a rejection of that view. The court below observed, however, that this Court in *Pino* "expressed no disagreement with the First Circuit's characterization of 'conviction' as a federal question," but simply had not addressed the issue. Pet. App. A10.

Pino also provided no basis for petitioner's contention that his conviction was not final, and that it therefore could not be the basis for his deportation. Pet. App. A13-A14. Although *Pino* itself gives little guidance regarding the standard of finality, the court noted, "all subsequent case authority has concluded that unless the alien has exhausted or waived his

rights to direct appeal or the appeals period has lapsed the criminal proceeding is not sufficiently final to constitute a conviction for immigration purposes." *Id.* at A13 (quoting *Martinez-Montoya*, 904 F.2d at 1026). The court observed that petitioner was not sentenced under a deferred adjudication statute; rather, his conviction was final on July 25, 1988, and his 30-day appeal period lapsed in August of that year. Pet. App. A13-A14.

ARGUMENT

1. Petitioner contends that the court of appeals erred in determining that he was convicted of a narcotics offense and is therefore subject to deportation under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(B)(i) (1988 & Supp. IV 1992). The Board of Immigration Appeals announced the governing interpretation of "conviction" in *In re Ozkok*, 19 I. & N. Dec. 546 (BIA 1988), and petitioner does not question that his conviction meets the *Ozkok* standard. Rather, he asserts (Pet. 8-12, 16-21) that *Ozkok* is invalid because it conflicts with congressional intent, and with this Court's decision in *Pino* v. *Landon*, 349 U.S. 901 (1955) (per curiam).[3]

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[3] Although petitioner contends that the court of appeals' fundamental error was in failing to view interpretation of "conviction" as a question of state law, petitioner has failed even to assert that, if Texas law controlled, the judgment against him would not be treated as a conviction. Moreover, petitioner erroneously assumes that, if *Ozkok* were invalid, state law would govern. Even the BIA's pre-*Ozkok* interpretation of "conviction" was a federal-law standard—albeit one that placed greater emphasis on the consequences the States attached to judgments of conviction. Indeed, petitioner himself

The court of appeals correctly rejected petitioner's attack on *Ozkok*, and its decision is consistent with the uniform adherence to the *Ozkok* standard by other courts of appeals. See, *e.g.*, *Paredes-Urrestarazu* v. *INS*, 36 F.3d 801, 811 n.11 (9th Cir. 1994); *Yanez-Popp* v. *INS*, 998 F.2d 231, 234-237 (4th Cir. 1993); *Molina* v. *INS*, 981 F.2d 14, 18-23 (1st Cir. 1992); *Martinez-Montoya* v. *INS*, 904 F.2d 1018, 1021, 1024 (5th Cir. 1990); *Chong* v. *INS*, 890 F.2d 284, 285 (11th Cir. 1989) (per curiam). No further review is therefore warranted.

2. a. Petitioner also contends that, as a first offender convicted of simple possession of marijuana, he should be exempt from deportation under the analysis of *Rehman* v. *INS*, 544 F.2d 71 (2d Cir. 1976). Pet. 12-16. *Rehman* held that an alien was not subject to deportation because his conviction of possession of marijuana under New York law was accompanied by a "certificate of relief from disabilities," 544 F.2d at 72, and because, had he been prosecuted under federal law, he would have been entitled as a first offender to full expungement of his conviction under 21 U.S.C. 844. Judge Lumbard reasoned that

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implicitly acknowledges as much. See Pet. 12 (referring to the pre-*Ozkok* decision in *Rehman* v. *INS*, 544 F.2d 71 (2d Cir. 1976), as agreeing with the decision below "that the definition of what constitutes 'conviction' is an issue of federal and not state law"). What petitioner apparently seeks is not application of state as opposed to federal law, but application of the BIA's pre-*Ozkok* (federal-law) standard, under which even a formal judgment of conviction was not a basis for deportation unless the state attached legal consequences to it. See pages 3-4, *supra*.

> where mandatory deportation would frustrate the purposes of a state's relief statute, and federal law provides for erasure of federal convictions under circumstances identical to those of the case at issue, it seems to us that the state's leniency policy can be respected without fear of undermining enforcement of federal deportation laws. States' freedom to remove persons from the ambit of deportation law would extend no further than where Congress itself has gone for federal criminals.

544 F.2d at 75.

Rehman provides no basis for further review here. The claim that petitioner's deportation is inconsistent with coordinate state and federal policies regarding treatment of first offenders is beyond the scope of the questions presented in the petition. Moreover, petitioner raises this contention for the first time in this Court; his failure to raise it in the immigration courts or before the Fifth Circuit waived it.[4]

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[4] Section 106(c) of the INA, 8 U.S.C. 1105a(c), requires an alien to exhaust "the administrative remedies available to him as of right under the immigration laws and regulations" before seeking review of an adverse deportation determination in the courts of appeals. That provision forecloses judicial review of claims aliens fail to raise in their administrative appeals. See, *e.g.*, *Ravindran* v. *INS*, 976 F.2d 754, 761 (1st Cir. 1992); *Rivera-Zurita* v. *INS*, 946 F.2d 118, 120 n.2 (10th Cir. 1991); *Farrokhi* v. *INS*, 900 F.2d 697, 700 (4th Cir. 1990); *Florez-de Solis* v. *INS*, 796 F.2d 330, 335 (9th Cir. 1986); *Yahkpua* v. *INS*, 770 F.2d 1317, 1320 (5th Cir. 1985); *Kahlenberg* v. *INS*, 763 F.2d 1346, 1352 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); *Valadez-Salas* v. *INS*, 721 F.2d 251, 252 (8th Cir. 1983); *Tejeda-Mata* v. *INS*, 626 F.2d 721, 726 (9th Cir. 1980), cert.

b. Although petitioner did not raise the issue below or properly present it here, he may actually be exempt from deportation as a first offender. The Board of Immigration Appeals (BIA) in *In re Manrique*, Interim Dec. 3250 (BIA May 19, 1995), modified its position regarding the immigration consequences of a first narcotics offense prosecuted under state law. Before *Manrique*, an alien prosecuted for a narcotics offense under state law was ineligible for deportation due to his status as a first offender only if the statute under which he was prosecuted was the state "equivalent" or "counterpart" to the Federal First Offender Act (FFOA), 18 U.S.C. 3607.[5] See, *e.g.*, *In re Deris*, Interim Dec. 3102 (BIA Apr. 19, 1989); *In re Golshan*, 18 I. & N. Dec. 92 (BIA 1981). In the interest of uniform implementation of the immigration laws, however, the BIA in *Manrique* determined that even an alien whose conviction is set aside pursuant to a state statute that is not equivalent to the FFOA should nonetheless be exempt from deportation based upon the conviction if

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denied, 456 U.S. 994 (1982); *Der-Rong Chour* v. *INS*, 578 F.2d 464, 468 (2d Cir. 1978), cert. denied, 440 U.S. 980 (1979).

[5] Manrique had been convicted of possession of cocaine under Louisiana law and was sentenced to five years' probation and to payment of a fine of $5,000. Applying the BIA's former standard, the immigration judge held that the Louisiana statute under which Manrique had been prosecuted was not an exact equivalent of the FFOA because it was not limited to controlled substance offenses, but authorized first-offender treatment for a broader range of offenses. Because petitioner failed to raise it, the question whether the Texas law under which petitioner's conviction was expunged was equivalent to the FFOA was never addressed in the immigration proceedings or the court of appeals.

he would have been eligible for first-offender treatment had he been prosecuted under federal law. *Manrique*, slip op. 11.[6]

Manrique applies to aliens prosecuted under state law who demonstrate that: (1) they are first offenders, not previously convicted of violating any federal or state law relating to controlled substances; (2) they have pled or been found guilty of the offense of simple possession of a controlled substance; (3) they have not previously been accorded first offender treatment under any law; and (4) the state court has entered an order pursuant to a state rehabilitative statute under which the alien's criminal proceedings have been deferred pending successful completion of probation or the proceedings have been or will be dismissed after probation. Slip op. 12.

Petitioner may meet those criteria.[7] If he had raised the issue below and properly presented it here,

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[6] The federal first offender statute in effect when the initial immigration decision was made in this case, 21 U.S.C. 844(b), was repealed by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 219(a), 235(a)(1), 98 Stat. 2027, 2031, amended by the Sentencing Reform Act, Pub. L. No. 99-217, § 4, 99 Stat. 1728, but Congress simultaneously reenacted a revised version of the first offender statute, effective November 1, 1987. Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 2003, codified at 18 U.S.C. 3607 (Supp. IV 1986).

[7] It appears that petitioner had no prior federal or state controlled substance convictions, and that he had not previously been accorded first offender treatment under any law. He pled guilty to the charge of possession of marijuana. Petitioner served four years' probation, and the state court thereafter set aside the conviction, dismissed the indictment, and released petitioner from all disabilities of the conviction; the $500 fine, however, was not set aside.

we would suggest that the decision of the court of appeals be vacated and the case remanded for further proceedings in light of *Manrique*.[8] Because the court of appeals correctly decided the issues petitioner presented to it, however, we believe that the appropriate course is to deny the current petition. The INS would not, however, oppose a motion by petitioner to reopen proceedings before the BIA to litigate the question whether *Manrique* applies to exempt petitioner from deportation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] The BIA in *Manrique* itself remanded that case to the immigration judge to determine whether the alien met the new criteria.